BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MARY M. LIPPMAN
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-397
Case No. D-77-229

S.S.A. No.

DELTA AIR LINES
(Self-Insurer)
Legal Department

Voluntary Plan No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. NH-DC-11956

The Department appealed from the decision of the administrative law judge which held that the claimant was entitled to disability insurance benefits from the Disability Fund rather than the employer-self-insurer.

STATEMENT OF FACTS

The claimant was last employed by the above-named employer as a sales production clerk. She last worked on January 31, 1977. She commenced a pregnancy leave of absence without pay effective February 1, 1977. Such leave continued the employer-employee relationship for the duration of the leave. The claimant had a normal pregnancy and delivered her baby on March 21, 1977. She also underwent a tubal ligation on that date. This was a voluntary procedure and had nothing to do with the pregnancy.

The claimant filed a claim for disability benefits on March 24, 1977. That claim was backdated, in accordance with normal procedure, and given an effective date of February 22, 1977.

A representative of the Department testified that in pregnancy cases the Department is not enforcing the 20-day late provision (section 2706.1 of the code) strictly, because of the impossibility of predicting the date when normal pregnancy benefits become payable due to the uncertainty of the date of birth.

After serving a seven-day waiting period, benefits were paid commencing March 1, 1977 to and including May 1, 1977. Benefits paid for the period commencing March 1, 1977 to and including March 20, 1977 were paid for normal pregnancy. The claimant's doctor gave a prognosis of six weeks for the tubal ligation. Benefits for that condition were accordingly paid commencing March 21, 1977 to and including May 1, 1977. The claimant received a total of $1,054 in basic disability benefits which were paid at a weekly rate of $119. She also received $48 in hospital disability benefits for four days of hospital confinement commencing March 21, 1977. These benefits ($1,054 and $48) were paid by the Disability Fund after the employer-self-insurer had refused on May 11, 1977 to pay such claim.

The claimant's leave of absence terminated when she presented appropriate medical records to the employer to show she was able to resume her employment, which she did on May 21, 1977.

Paragraph IV. C. of the employer's self-insured voluntary plan provides in part:

> "C. EMPLOYEES WILL BE LIMITED TO STATE PLAN BENEFITS UNDER THE FOLLOWING SITUATIONS:
>
> * * *
>
> "(2) For disabilities caused by or arising in connection with pregnancy;"

Paragraph VI. of said plan provides in part:

> "VI. TERMINATION OF INDIVIDUAL EMPLOYEE COVERAGE
>
> "An employee's coverage will terminate:

"A. On the date of termination of employment by termination of the employer-employee relationship, or on the fifteenth day following a leave of absence without pay or a layoff without pay, or,"

Paragraphs VIII. and XI. provide:

"VIII. COMPLIANCE The employer hereby guarantees that each employee covered by this plan will in all respects be afforded rights at least equal to those afforded by the State Disability Fund and will receive a weekly rate and maximum amount and duration of benefits at least equal to those which he would have received from the State Disability Fund but for his coverage by this plan.

"XI. CLAIMS To claim benefits under this plan, obtain a claim form from your supervisor. A claim must be filed not later than the 20th compensable day of disability, provided that an extension shall be granted for good cause."

REASONS FOR DECISION

Section 3253 of the Unemployment Insurance Code provides:

"Except as provided in this part, an employee covered by an approved voluntary plan shall not be entitled to benefits from the Disability Fund for a disability which commenced while he is covered by the voluntary plan. The Director of Employment Development shall prescribe authorized regulations to allow benefits to individuals simultaneously covered by one or more approved voluntary plans and the Disability Fund."

Subdivision (a) of section 3254 of the code provides:

> "The Director of Employment Development shall approve any voluntary plan, except one filed pursuant to Section 3255, as to which he finds that there is at least one employee in employment and all of the following exist:
>
> "(a) The rights afforded to the covered employees are greater than those provided for in Chapter 2 (commencing with Section 2625) and Chapter 3 (commencing with Section 2800) of this part."

Subdivision (c) of section 3254-1, Title 22, California Administrative Code, provides:

> "To be approved by the department a voluntary plan must meet each of the following minimum provisions and in addition provide to the employees covered thereby rights greater than those provided in Chapters 2 and 3 of Part 2 of the code:"
>
> * * *
>
> "(c) No voluntary plan may impose restrictions on or exclusions from eligibility for benefits in respect to individuals covered by such plans in such manner as to deny benefits which would be payable to the individual from the Disability Fund but for his inclusion in the voluntary plan."

The following appears in Appeals Board Decision No. P-D-149:

> ". . . the termination of coverage provisions [in voluntary plan contracts] are not applicable to pregnancy cases for the reason that to hold otherwise would render the Voluntary Plan less favorable than the State Plan. . . ."

Section 2626 of the code provides:

> "'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work."

Subdivision (c) of section 2626.2 of the code became operative with respect to periods of disability commencing on or after January 1, 1977. That provision provides:

> "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:"
>
> * * *
>
> "(c) Disability benefits shall be paid, upon a doctor's certification that the claimant is disabled because of a normal pregnancy, for a period not to exceed three weeks immediately prior to the expected birth of a child, and for a period not to exceed three weeks immediately after the termination date of a normal pregnancy. A normal pregnancy presupposes the birth of a live infant without the abnormal complications specified in subdivision (a) of this section."

The employer asserts that it should not be liable for the payment of benefits on various grounds:

> (1) Appeals Board Decision No. P-D-149 should not be controlling because "the entire scheme of benefits for disability due to pregnancy was different at the time P-D-149 was decided [originally in 1951]. Delta therefore submits that the EDD's reliance on P-D-149 is misplaced and the EDD appeal should be denied upon this basis."

(2) An interpretation of the law that would require the employer-self-insurer to pay benefits in the instant case would be unconstitutional in that such an interpretation would be a denial of due process to the employer.

(3) Under the termination provision of the self-insured voluntary plan, above quoted, the self-insured plan should be off the risk because the disability commenced after the fourteenth day of an unpaid leave of absence.

(4) Benefits should not be paid because the claim was not filed within 20 days after the commencement of the disability as required by section 2706.1. That provision provides in part:

"A first claim, accompanied by a certificate on a form furnished by the Department of Employment Development to the claimant, shall be filed not later than the 20th consecutive day following the first compensable day of unemployment and disability with respect to which the claim is made for benefits, which time shall be extended by the Department of Employment Development upon a showing of good cause. . . ."

(5) Tubal ligation is a voluntary procedure and is not an illness or injury and is therefore not covered under the disability insurance law.

(6) Provision of benefits for "normal pregnancy" and tubal ligation awarded consecutively when the period of occurrence was concurrent was not pursuant to written rules and was therefore arbitrary and incorrect.

The fact that the scheme of payment of disability benefits for pregnancy was different in 1951 than it is today does not alter the reasoning in Appeals Board Decision No. P-D-149. The rationale is equally applicable to the scheme of payment of disability benefits today. If the termination of coverage provisions were to apply, the payment of pregnancy benefits under the voluntary plan contract would be less favorable than the payment of such benefits from the Disability Fund. Whereas the Disability Fund would always be on the risk in such situations, a voluntary plan could escape liability in such circumstances.

Also, if the termination of coverage provisions of the voluntary plan were allowed to apply in a pregnancy situation, the six weeks of liability for normal pregnancy provisions of a voluntary plan would be virtually nullified. The date of delivery would invariably be beyond the 15-day period, as is the situation herein. Furthermore, if the termination provisions were allowed to be applied, an employer could plan to avoid such liability by requiring an unpaid leave of absence to commence early enough so that birth would necessarily occur after the 15-day period. A discharge at an early enough date could also be used by an employer to avoid such liability

By the passage of subdivision (c) of section 2626.2 of the code, the Legislature has expressed its intent that up to six weeks of benefits are to be paid for normal pregnancy. It is obvious from this that a voluntary plan contract cannot be interpreted in such a manner that the plan will be able to shift this obligation to the Disability Fund, when the law requires that voluntary plan benefit obligations are to be at least equal to those of the Disability Fund.

We fail to see that requiring the employer to pay disability benefits in the factual situation before us would result in a denial of due process. The employer agreed under its voluntary plan contract, Paragraph IV. C., to pay disability benefits for pregnancy where such benefits would be payable from the Disability Fund. The employer is being required to pay no more than it has agreed to pay. We see no denial of due process in this.

Since the holding in Appeals Board Decision No. P-D-149 is applicable to the facts of this case, the 14-day termination provision in the voluntary plan contract is not applicable to the facts of this case.

Section 2601 of the code provides that the disability insurance part of the code "shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family."

In the spirit of the last quotation, the explanation given by the Department as to why it does not rigidly apply the requirement of section 2706.1 of the code to pregnancy cases is reasonable. We note that section

2706.1 of the code has a good cause provision. That provision is certainly applicable in situations such as the present where there is no means to predict a date of birth with accuracy.

The assertion that voluntary procedures which render an individual disabled are not covered under the disability insurance law is simply not correct. Section 2626 of the code provides that benefits are payable if an individual is physically unable to perform his regular or customary work. There is no exclusion for voluntary procedures such as hernia repair, hemorrhoidectomy, tubal ligation, etc. Benefits are accordingly paid for such disabilities.

The statement made in item (6), above, is also not correct. The disabilities involved in the instant case are not concurrent. Benefits because of pregnancy were paid from March 1, 1977 through March 20, 1977. Benefits because of the tubal ligation were paid from March 21, 1977 through May 1, 1977.

Since coverage under the voluntary plan continued following January 31, 1977, and since the voluntary plan cannot impose restrictions or exclusion from coverage to deny benefits which would be payable from the Disability Fund under like circumstances, it must be concluded that the employer-self-insurer is liable for the benefits paid for pregnancy in the instant case; that is, the benefits paid commencing March 1, 1977 to and including March 20, 1977.

The benefits paid for the tubal ligation, including the hospital benefits, are rightfully paid from the Disability Fund.

In Disability Decision No. D-660, the claimant suffered from an industrial injury followed by a nonindustrial injury, with no interruption of the claimant's period of disability between the two injuries. It was held that the claimant's award of disability benefits for the nonindustrial injury could not be reduced by the amount of worker's compensation received for the industrial injury. The claimant was held to be entitled to his full award from the Disability Fund for the subsequent nonindustrial injury. This decision is instructive in reaching a decision herein.

In the instant case we have a pregnancy condition which is properly covered by the voluntary plan, as above concluded, immediately followed by a nonpregnancy related condition. The second condition, being nonpregnancy related, is no different, in benefit effect, than a broken arm that is disabling. Normal rules of determining benefit entitlement and fixing benefit liability apply. Appeals Board Decision No. P-D-149 does not apply since a tubal ligation (or a broken arm) are nonpregnancy related conditions.

Accordingly, the provision under the voluntary plan contract terminating voluntary plan liability following the fourteenth day of a leave of absence without pay applies. Since the tubal ligation, a nonpregnancy related condition, occurred beyond this 14-day period, and the claimant was on a leave of absence without pay, voluntary plan coverage ceased for such condition. The Disability Fund is therefore properly on that risk.

The fact that there is one continuous period of disability, without a break between the two disabilities, should not keep the voluntary plan on a risk (tubal ligation) for which it is not responsible. In Disability Decision No. D-660 the one continuous period of disability did not relieve the Disability Fund of its full responsibility for the nonindustrial risk, just because the claimant had received worker's compensation during the same period of disability for an industrial risk.

In the same manner, in the instant case, the fact that the voluntary plan is responsible for one risk during a period of disability, should not relieve the Disability Fund of its full responsibility for another risk during the same period of disability.

The Disability Fund is therefore liable for the basic and hospital benefits paid for the period commencing March 21, 1977 to and including May 1, 1977.

Pursuant to section 2712 of the code, the employer-self-insurer shall reimburse the Disability Fund for benefits paid for the period commencing March 1, 1977 to and including March 20, 1977.

We note in passing that if it were not for the tubal ligation, six weeks of benefits would be payable in the instant case under subdivision (c) of section 2626.2 of the code, and the employer-self-insurer would have been on that risk.

DECISION:

The decision of the administrative law judge is modified. The employer-self-insurer shall reimburse the Disability Fund as above indicated. Benefits from the Disability Fund were properly paid for the period above indicated.

Sacramento, California, July 18, 1978.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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